IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-964

MILLARD C. FARMER, JR.,

Petitioner,

v.

ELIE L. HOLTON, JUDGE,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF GEORGIA

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Petitioner prays that a writ of certiorari issue to review the judgment of the Court of Appeals of the State of Georgia, rendered May 4, 1978.

CITATIONS TO OPINIONS BELOW

The opinion of the Court of Appeals of the State of Georgia is reported at 146 Ga. App. 101, 245 S.E.2d 457, and is attached as Appendix A. The Supreme Court of Georgia denied a petition for certiorari, Hall J. specially concurring, and a motion for reconsideration in unreported orders which are attached as Appendix B.

JURISDICTION

The judgment of the Court of Appeals of the State of Georgia was entered on May 4, 1978, rehearing denied, May 26, 1978. The Supreme Court of Georgia denied a timely petition for certiorari on September 14, 1978, reconsideration denied, October 3, 1978. Jurisdiction of this Court is invoked under 28 U.S.C. §1257(3), petitioner having asserted below and asserting here deprivation of rights secured by the Constitution of the United States.

QUESTIONS PRESENTED

(1) Whether petitioner, an attorney representing an indigent black client at a capital sentencing hearing, was deprived of due process of law as guaranteed by the Fourteenth Amendment to the Constitution of the United States by being summarily adjudicated in criminal contempt of court and sentenced to jail on a preponderance of the evidence rather than on evidence which established his guilt beyond a reasonable doubt?

(2) Whether petitioner's convictions and sentences for criminal contempt were imposed in violation of the Fourteenth Amendment to the Constitution of the United States, as construed by this Court in decisions holding that the contempt power may not be used to punish protests of racially derogatory forms of address or the raising of legal arguments?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. This case involves the Fourteenth Amendment to the Constitution of the United States.

2. It also involves the following provisions of Georgia law:

Ga. Code Ann. §24-104 (1971):

> *"Powers of courts enumerated.*—Every court has power— 1. To preserve and enforce order in its immediate presence, and as near thereto as is necessary to prevent interruption, disturbance, or hindrance to its proceedings....
>
> 3. To compel obedience to its judgments, orders, and process, and to the orders of a judge out of court, in an action or proceeding therein.
>
> 4. To control, in furtherance of justice, the conduct of its officers and all other persons connected with a judicial proceeding before it, in every matter appertaining thereto."

Ga. Code Ann. §24-105 (1971):

> *"Powers of courts to punish for contempt.*— The powers of the several courts to issue attachments and inflict summary punishment for contempt of court shall extend only to cases of misbehavior of any person or

> persons in the presence of said courts or so near thereto as to obstruct the administration of justice, the misbehavior of any of the officers of said courts in their official transactions, and the disobedience or resistance by any officer of said court, party, juror, witness, or other person or persons to any lawful writ, process, order, rule, decree, or command of said courts."

Superior Court Rule 23 (Ga. Code Ann. §24-3323 (1976)):

> "No attorney shall ever attempt to argue or explain a case, after having been fully heard, and the opinion of the court has been pronounced, on pain of being considered in contempt."

STATEMENT

Petitioner is a member of the Georgia Bar who was twice found in contempt of court while defending an indigent, black client at a hearing to determine whether this client would be sentenced to life or death for murder. The contempt citations and consecutive sentences of one days' and three days' imprisonment were imposed after petitioner had vigorously protested what he perceived as invidious racial discrimination against his client. The Georgia Court of Appeals affirmed, following settled Georgia precedent, ruling that contempt of court "'is only quasi-criminal'" and is properly "'tried under the rules of civil procedure[;] . . .

a preponderance of evidence is sufficient to convict the defendant, as against the requirement of removal of any reasonable doubt which prevails in criminal cases.'" The Supreme Court of Georgia denied certiorari.

The two criminal contempts occurred on September 14 and 22, 1977, in the Pierce County Superior Court, while petitioner was representing Mr. George Street, who had previously been convicted of murder, at a proceeding to determine whether Street would be sentenced to death by electrocution or life imprisonment.[1] Petitioner was at the time Director-Counsel for Team Defense, Inc., a not-for profit, publicly supported organization devoted to the representation of the indigent in cases involving significant civil rights and civil liberties issues.

At a motions hearing on September 14, 1978, before a jury was selected, petitioner called Street to the stand to testify in support of a motion to disqualify assistant prosecutor Dean Strickland. While employed by the local public defender's office, Strickland had previously represented Street, and had conducted that

[1]Street had previously been convicted of armed robbery and murder and had received a death sentence for murder. *Street* v. *State*, 237 Ga. 307, 227 S.E. 2d 750 (1976). This Court reversed Street's death sentence, *Street* v. *Georgia*, 429 U.S. 995 (1976), because of a jury selection procedure which was violative of the rule of *Witherspoon* v. *Illinois*, 391 U.S. 510 (1968). The Georgia Supreme Court then remanded the case, *Street* v. *State*, 238 Ga. 376, 233 S.E.2d 344 (1977), for the resentencing hearing at which the two criminal contempts occurred. Petitioner had represented Street on certiorari to this Court and continued to represent him during the subsequent resentencing proceeding.

office's initial interview with Street. Petitioner contended that Strickland had learned confidential information during this interview which would be of value to the State in the current prosecution. After Street described his interview by Strickland, Assistant District Attorney M.C. Pritchard cross-examined and repeatedly called Street by his first name. Petitioner objected to this usage, arguing that it was racially condescending toward his client and was an expression of invidious discrimination forbidden by the Fourteenth Amendment since all other participants in the trial (who were white) were addressed by the prosecution and by the court as "Mister." The trial judge, Honorable Elie Holton, refused to prohibit the use of Street's first name by the prosecution, and petitioner replied:

> "MR. FARMER: Your Honor, I object again to him calling my client George. We have stated repeatedly. He has used the term colored folks and he referred to yesterday them [sic]. . . . All of those things are racial slurs. This prosecutor is a racist. And, we've got to prevent it from coming through to the jury. We've got to prevent it from coming through to the Court at every stage. We resent the fact that he is referring to the client as . . . [George]. We have been through this situation in this State in which a trial judge allowed and told prosecutors and District Attorneys not to call black people Mr. in his Court. That's got to stop in this State if black people are to have equal justice. And, it can't stop if objection is not

> made to it at a proper time. If he is to address this individual he will address him as he addresses every other witness. He is not his friend. He is trying to have him electrocuted. And, he should address him as Mr. And, I object most strenuously to him using this term and it's being used in a derogatory and discriminatory way, just as he was using colored and them and they and those kind of terms. They're all derogatory, racial slurs.
>
> THE COURT: Objection overruled."

Petitioner rhetorically (and hypothetically) then asked "Your Honor, do you object to me calling you Elie?" The Court cautioned petitioner not to use this form of address upon pain of contempt, and petitioner obeyed this instruction and respectfully addressed the Court as "Your Honor" throughout. However, when petitioner's client was further addressed as "George" by the prosecution, petitioner objected again that this reference was racially demeaning, and the first finding of summary contempt occurred after the following exchange.

> "MR. FARMER: What, Your honor, may I ask the Court. I want to inquire . . .
>
> THE COURT: You are to be quiet at this point and we're going to proceed with the cross examination.
>
> MR. FARMER: When may I make an objection?

THE COURT: Are you going to allow us to proceed with the cross examination of this witness?

MR. FARMER: Your honor, I feel like in representing my client...

THE COURT: Mr. Farmer, this Court finds your continual interruption of the Court, your refusal to allow us to continue with examination of this witness to be in contempt of Court. This Court so finds you in contempt of Court. It is the judgment of the Court that you are in contempt of Court. It's the judgment of the Court that you be sentenced to the common jail of this county for a period of 24 hours."

Petitioner was subsequently admitted to bond pending appeal before serving his sentence.

The second summary adjudication of contempt occurred on September 27, 1977, during an individual *voir dire* of the jury venire at a time when no jurors had been selected, and no veniremen were present. Petitioner had argued that his client was being subjected to racial discrimination in the courtroom.

"MR. FARMER: All right, sir, the point I want to make is Your Honor, that I feel that you are discriminating against my client because he's black.

THE COURT: Mr. Farmer, the argument is closed. You have used up your argument. You're overruled. The witness [venireman] is not struck [for cause]. Have a seat, sir.

MR. FARMER: Your Honor, may I be heard on another issue?

THE COURT: No, sir. We're going to proceed with the voir dire.

MR. FARMER: Your Honor, may we have an opportunity to deal with at some point if the Court will tell us when we can deal with the racial prejudice that is existing in this courtroom and make a record of...

THE COURT: You're not going to deal with it at any point.

MR. FARMER: May we make a record on it and show what's happening, Your Honor, that...

THE COURT: There's a complete record being made of everything going on in this courtroom."

Petitioner contended that a racially differential standard was being applied when jurors were stricken for cause, but the trial court refused to hear evidence on this:

"MR. FARMER: Your Honor, the Court has ruled that we can't make a showing on that and the Court has ruled that — I understand the

Court's ruling on that matter. I want the Court to understand that our motion is to the Court, that there is a pattern of discrimination that is existing and that this pattern has developed itself as we told the Court in the pre-trial motions that it would develope [sic] itself.

THE COURT: I don't want to hear anymore of that.

MR. FARMER: And, I...

THE COURT: And, I'm not going to hear it. You're just making an argument and that's all.

MR. FARMER: May we ask the Court...

THE COURT: No, sir."

The next venireman, a black woman, was then examined. The following occurred:

"Q. [The District Attorney] Do you have any fixed opinions about what the verdict ought to be?

A. [Venireman] About this case?

Q. Yes, about this case?

A. Yes. No, uh, huh.

Q. Let me ask you again, because I want to make sure you understand. You understand what I mean by a fixed opinion?

A. No, what?

Q. I mean a fixed opinion is where you've already got it made up in your mind what you're going to do if you serve on the jury and it wouldn't make no difference what the evidence was. That's what you call fixed?

A. Right, right, yes, sir.

Q. You understand it now?

A. That's right.

Q. Do you have a fixed opinion about what the sentence ought to be?

A. Right.

Q. You understand perhaps that since he's already been found guilty the sentence could only be one of two things, it could be a life sentence or a death sentence?

A. That's right...

Q. Did I understand you correctly when you said that you had a fixed opinion about what the punishment should be?

A. That's right.

Q. I believe you told me that you understand that he had been found guilty and now it was just fixing the punishment at either life or the death sentence. You understand that?

A. Yes, sir.

Q. Do you already have it fixed which that should be?

A. Right.

Q. What?

THE COURT: Just — I'm not going to let you ask her what."

Petitioner was then permitted to question the venireman:

"Q. [Petitioner] Is there any reason that you can't listen to the evidence in this case and decide it fairly between the State and the defendant — could you be fair in this case?

A. Say what?

Q. Can you be fair in this case and listen to what takes place in the courtroom here and make a decision?

A. That's right.

Q. And, any ideas that you might have about the case can you put them aside and decide it right on what's heard here in this courtroom and decide the case fairly?

A. Right.

Q. And, can you do that in this case — you can decide it fairly?

A. Right.

MR. FARMER: Thank you."

The trial court then granted the District Attorney's motion to strike the venireman for cause, over petitioner's objection, and the court recessed for lunch.

After lunch, petitioner reported a "direct incident" of intimidation of a black citizen (who wished to observe the trial) by her white employer, who was a venireman on the present panel. Petitioner was allowed to call this would-be observer, Ms. Betty Washington; she had been phoned by her employer (who had apparently seen her at court) the previous afternoon and asked "why was I up there, being noisy [sic: nosey?]" and "was I being paid to come up here." The District Attorney then cross-examined Ms. Washington as to whether *she* had contacted any jurors on the telephone. The trial court then assured Ms. Washington of her right to attend public sessions of the court and asked her to report any threats or harassment to him. The court indicated that it would deal with the possible intimidation of black jurors as these jurors were individually examined on voir dire. Petitioner urged that the issue of intimidation should be explored immediately:

"MR. FARMER: Your Honor, the reason that we wanted to deal with it at this time is to point out to the Court, is that here are things that we are being able to show you and show the Court

that's happening. We are not able to find out about everything that happens. We are only able to, I'm sure, know a very, very small part of what is happening. And, the Court has got to take corrective action and the Court has got to deal with this in a way that we've previously suggested in order that it will not happen. And, the Court has got to allow us to inquire into what the Court before lunch previously wants to cover up. And, that is the racism that exists that's effecting [sic] these jurors and effecting [sic] Your Honor...

MR. HAYES: Your Honor, the State objects to the improper malicious argument he's making on the Court.

THE COURT: All right, Mr. Farmer, the statement that the Court wants to cover it up is direct contempt of this Court, knowingly made by you. I have repeatedly warned you about this. Again you have sought to make that statement. The Court finds you in contempt of Court; sir, again. The Court sentences you to 3 days in the court jail, ser...

MR. FARMER: Your Honor, may I be...

THE COURT: ...service to begin at the termination of this case. That's all.

MR. FARMER: Your Honor, may I be heard on this?

THE COURT: No, sir.

MR. FARMER: Your Honor, may I have counsel to represent me and present evidence on this issue?

THE COURT: No, sir."

Petitioner was admitted to bond pending the appeal of his contempt conviction. The *Street* resentencing trial proceeded, with petitioner serving as Street's counsel, and Street ultimately received a sentence of life imprisonment. Since Street received the most favorable sentence possible under the circumstances, he did not appeal.

As previously indicated, petitioner appealed his contempt citations, and the Georgia Court of Appeals affirmed, rejecting petitioner's contention that the evidentiary standard which the trial court should have used was the criminal "beyond a reasonable doubt" standard. In a brief opinion denying petitioner's rehearing motion, the Court reemphasized its "holding that the standard of proof to be applied in contempt actions such as this is the civil stndard of a preponderance of the evidence," 245 S.E.2d at 462.[2]

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[2] After the Supreme Court denied certiorari, the Georgia Court of Appeals granted on October 31, 1978, petitioner's motion to hold remittitur pending this Court's reconsideration of this petition for certiorari. Petitioner has thus not yet served any of his two sentences of imprisonment.

HOW THE FEDERAL QUESTIONS WERE RAISED AND DECIDED BELOW

Point 2 of petitioner's Enumeration of Errors in the Georgia Court of Appeals recited that "The judgments and sentences of criminal contempt in the above referenced appeals are in error because the Trial Judge failed to make findings that such criminal contempt had been proven beyond a reasonable doubt," and petitioner argued this point as a Fourteenth Amendment due process question in his brief, Brief of Appellant at 7-8. Point 3 contended that petitioner could not be held in contempt because of this Court's decision in *Johnson* v. *Virginia*, 373 U.S. 61 (1963) and *Hamilton* v. *Alabama*, 376 U.S. 650 (1964), *id.* at 8-11. The Georgia Court of Appeals explicitly rejected the first contention, *Farmer* v. *Holton, supra*, 245 S.E.2d at 462, and implicitly rejected the second. In his Motion for Rehearing (at p. 1) in the Georgia Court of Appeals, petitioner reiterated that the preponderance of evidence standard "is contrary to the due process clause of the Fourteenth Amendment,'" and the Court of Appeals again explicity rejected this argument in a brief opinion "On Motion For Rehearing", *Farmer* v. *Holton, supra*, 245 S.E.2d at 462. Petitioner's Application for Certiorari in the Georgia Supreme Court (at pp. 8-11) submitted for review as Question 1 the contention that the Fourteenth Amendment's Due Process Clause required application of the beyond-a-reasonable-doubt standard to an adjudication of criminal contempt and that petitioner had been held in contempt for constitutionally protected conduct. The Georgia Supreme Court denied certiorari. Petitioner

moved the Georgia Supreme Court for rehearing of this denial urging, *inter alia*, that "Petitioner has a right, under the . . . Fourteenth Amendmen[t] to the Constitution of the United States, not to be penalized for vicariously asserting the right of his indigent criminal client to be free from racial discrimination," (P. 3) but the Georgia Supreme Court denied this motion.

REASONS FOR GRANTING THE WRIT

The questions presented by this petition are whether a finding of guilt beyond a reasonable doubt by the trial court is a necessary predicate to imprisonment for criminal contempt and whether petitioner was punished for conduct which this Court has held constitutionally protected. This petition does *not* present any question concerning a court's inherent power to punish summarily affronts to its authority commited in open court in the immediate view of the judge, *cf. Harris* v. *United States*, 382 U.S. 162 (1965); *United States* v. *Wilson*, 421 U.S. 309 (1975). The issue here is rather the *standard* by which guilt must be adjudicated.

The court below correctly construed applicable Georgia precedent and held that a beyond-a-reasonable-doubt finding was not necessary and that guilt need only be established in the trial court by a preponderance of the evidence. *Pedigo* v. *Celanese Corp. of America*, 205 Ga. 392, 54 S.E.2d 252 (1949), relied upon by the court below, is representative. There, the Georgia Supreme Court rejected the contention that "it would be necessary to apply the rule as to

reasonable doubt" to criminal contempt. 54 S.E.2d at 257. The court recognized that "[m]any courts have said that the reasonable doubt rule should be applied in such a case; indeed, the great weight of authority has apparently taken that view. . . . However that may be, we think that the question before us is one to be determined by the internal law of this State." *Ibid.* It proceeded to hold:

> "Although such a contempt is often referred to as criminal, we think that it is only quasi-criminal, in that it is a violation of an order of court as distinguished from a penal statute. The reasonable doubt rule in this State . . .applies by its terms only to 'criminal cases.' . . . [W]e think it clear . . . that it applies only in criminal cases, that is, where parties are being tried for the alleged commission of crimes as defined in [the] Code . . .; and we have not been able to find anything to indicate that the [reasonable doubt] rule was any part of the common law relating to criminal contempts as is existed prior to May 14, 1776."

54 S.E.2d at 257-258. *Accord: Colley* v. *Tatum,* 227 Ga. 294, 180 S.E. 2d 346, (1971); *Renfroe* v. *State,* 104 Ga. App. 362, 121 S.E. 2d 811, 814 (1961); *Hill* v. *Bartlett,* 124 Ga. App. 56, 183 S.E.2d 80, 81 (1971). A criminal contempt "is tried under the rules of civil procedure, rather than under the rules of criminal procedure, and a preponderance of the evidence is sufficient to convict the defendant." *Hill v. Bartlett, supra,* 183 S.E.2d at 81.

A direct corollory of this rule is that "if there is any substantial evidence authorizing a finding that the party or parties charged were guilty of such [criminal] contempt, and the trial judge so finds, his judgment must be affirmed in so far as sufficiency of the evidence is concerned," *Pedigo* v. *Celanese Corp. of America, supra,* 54 S.E.2d at 253. In other words, "the trial court's adjudication of contempt will not be interfered with unless there is a gross, enormous, or flagrant abuse of discretion,' *Renfroe* v. *State, supra,* 121 S.E.2d at 814. Applying this standard, the court below gave no weight to the facts that petitioner's allegedly contumacious conduct (1) was a relevant and well-founded objection to racially demeaning treatment of his client, and (2) was presented in the form of legal argument addressed to the trial court.[3] We respectfully suggest that the ruling below, applying settled Georgia precedent, presents significant questions which should be reviewed by this Court.

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[3]The two incidents of alleged contempt are closely related, for the first arose out of petitioner's objection to the court's allowing the prosecutor to address petitioner's client as "George" and the second was petitioner's reference to "the racism that exists" that "the Court before lunch and previously wants to cover up." This latter reference obviously included Judge Holton's earlier ruling which permitted the prosecutor to address defendant Street by his first name.

I. THE COURT SHOULD GRANT CERTIORARI TO CONSIDER WHETHER PETITIONER, AN ATTORNEY REPRESENTING AN INDIGENT BLACK CLIENT AT A CAPITAL SENTENCING HEARING, WAS DEPRIVED OF DUE PROCESS OF LAW AS GUARANTEED BY THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES BY BEING SUMMARILY ADJUDICATED IN CRIMINAL CONTEMPT OF COURT AND SENTENCED TO JAIL ON A PREPONDERANCE OF THE EVIDENCE RATHER THAN ON EVIDENCE WHICH ESTABLISHED HIS GUILT BEYOND A REASONABLE DOUBT.

We respectfully submit that the standard by which the trial judge adjudicated petitioner in criminal contempt is flatly inconsistent with the requirements of due process. The rationale that criminal contempt is only "quasi-criminal" will not withstand scrutiny, since the result of the proceeding is incarceration, *see In re Gault,* 387 U.S. 1, 27 (1967). As this Court long ago recognized, the purpose of "criminal contempt . . . is punitive, to vindicate the authority of the court," *Gompers* v. *Buck's Stove & Range Co.,* 221 U.S. 418, 441 (1911). "[C]riminal contempt is a crime in every fundamental respect." *Bloom* v. *Illinois,* 391 U.S. 194, 201 (1968).

This Court has held that even in "quasi-criminal" proceedings, the Fourteenth Amendment's Due Process Clause requires proof of guilt beyond a

reasonable doubt before incarceration may be imposed:

> "The requirement of proof beyond a reasonable doubt has . . . [a] vital role in our criminal procedure for cogent reasons. The accused during a criminal prosecution has at stake interests of immense importance, both because of the possibility that he may lose his liberty upon conviction and because of the certainty that he would be stigmatized by the conviction . . . .
>
> Moreover, use of the reasonable-doubt standard is indispensable to command the respect and confidence of the community in applications of the criminal law. It is critical that the moral force of the criminal law not be diluted by a standard of proof that leaves people in doubt whether innocent men are being condemned."

In re Winship, 397 U.S. 358, 363-364 (1970). Petitioner has exactly the same interest as the criminal defendant or the putative juvenile delinquent, for he may be "restrained of liberty," *In re Gault, supra,* 387 U.S. at 27, as a result of the contempt proceeding. In such a case, "the reasonable-doubt standard is indispensable, for it 'impresses on the trier of fact the necessity of reaching a subjective state of certitude of the facts in issue.'" *In re Winship, supra,* 397 U.S. at 364.

Petitioner's convictions and sentences of imprisonment were affirmed by the court below on the theory that "[i]f there is any substantial evidence authorizing a finding that the party so charged was guilty of contempt, and that is the trial judge's conclusion, his judgment must be affirmed insofar as the sufficiency of the evidence is concerned." *Farmer* v. *Holton, supra* 245 S.E.2d at 462. We respectfully submit that this standard of decision and of review does not comply with the Fourteenth Amendment and that the Georgia court's reliance on the label "quasi-criminal" totally ignores the important interest petitioner has in avoiding the loss of liberty and the obloquy stemming from an adjudication of criminal contempt. There are no "quasi-" jails. *"Winship* is concerned with substance rather than. . . formalism. The rationale of that case requires an analysis that looks to the 'operation and effect of the law as applied and enforced by the State,'" *Mullaney v. Wilbur,* 421 U.S. 648, 699 (1975) (footnote omitted):

> "There is always in litigation a margin of error, representing error in factfinding, which both parties must take into account. Where one party has at stake an interest of transcending value— as a criminal defendant his liberty— this margin of error is reduced as to him by the process of placing on the other party the burden of . . . persuading the factfinder at the conclusion of the trial of his guilt beyond a reasonable doubt. Due process commands that no man shall lose his liberty unless the Government has borne the burden of . . . convincing the factfinder of his guilt."

Speiser v. *Randall,* 357 U.S. 513, 525-526 (1958).

The Georgia rule is unique in this country and differs significantly from that of all other American jurisdictions. The federal rule is, of course, well settled: "it is certain that in a proceeding for criminal contempt the defendant . . . . must be proved to be guilty beyond a reasonable doubt." *Gompers* v. *Buck's Stove & Range Co., supra,* 221 U.S. at 444.[4] At least thirty-four states and the District of Columbia have adopted a similar rule, requiring proof beyond a reasonable doubt in criminal contempt cases. *Continental Insurance Co.* v. *Bayless & Roberts, Inc.,* 548 P.2d 398, 407 (Alas. 1976); *State* v. *Cohen,* 15 Ariz. App. 436, 489 P.2d 283, 287 (1971); *Howell* v. *State,* 514 S.W.2d 723, 724 (Ark. 1974); *In re Coleman,* 12 Cal. 3d 568, 116 Cal Rptr. 381, 526 P.2d 533, 536 (1974); *In re Pechnick,* 128 Colo. 177, 261 P.2d 504, 507-508 (1953); *City of Wilmington* v. *General Teamsters Local Union 326,* 321 A.2d 123, 126 (Del. 1974); *Matter of Carter,* 373 A.2d 907, 909 (D.C. 1977); *Turner* v. *State,* 283 So.2d 157, 160 (Fla. App. 1973); *Hawaii Public Employment Relations Bd.* v. *Hawaii State Teachers Assn.,* 55 Hawaii 386, 520 P.2d 422, 426 (1974); *Kay* v. *Kay,* 22 Ill. App.

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[4] *See also, Green* v. *United States,* 356 U.S. 165, 184 n.15 (1958); *United States* v. *Seale,* 461 F.2d 345, 372 (CA7 1972); *In re Brown,* 454 F.2d 999, 1007 (CADC 1971); *United States* v. *Patterson,* 219 F.2d 659, 662 (CA2 1955); *In re McIntosh,* 73 F.2d 908, 910 (CA9 1934).

3d 530, 318 N.E.2d 9, 10 (1974); *Alster* v. *Allen,* 174 Kan. 489, 77 P.2d 960, 966 (1938); *Brannon* v. *Commonwealth,* 162 Ky. 350, 72 S.W. 703, 706 (1915); *State* v. *Roll,* 267 Md. 714, 298 A.2d 867, 876 (1973); *Shaw* v. *Commonwealth,* 354 Mass. 583, 238 N.E.2d 876, 878 (1968); *Fraternal Order of Police* v. *Kalamazoo County,* 266 N.W.2d 895, 807 (Mich. App. 1978);[5] *State* v. *Binder,* 190 Minn. 305, 251 N.W. 665, 668 (1933); *Prestwood* v. *Hambrick,* 308 So.2d 82, 84 (Miss. 1975); *State ex rel. Wendt* v. *Journey,* 492 S.W.2d 861, 864 (Mo. App. 1973); *State ex rel. Tague* v. *District Court,* 100 Mont. 383, 47 P.2d 649, 651 (1935); *Paasch* v. *Brown,* 199 Neb. 683, 260 N.W.2d 612, 615 (1977); *Kellar* v. *Eighth Judicial District Court.* 86 Nev. 445, 470 P.2d 434, 436-437 (1970); *State* v. *Blaisdell,* ____ N.H. ____, 381 A.2d 1201, 1201-1202 (1978); *In re Buehrer,* 50 N.J. 501, 236 A.2d 592, 600 (1967); *International Minerals & Chemical Corp.* v. *Local 177, United Stone & Allied Products Workers,* 74 N.M. 195, 392 P.2d 343, 346 (1964); *State University of New York* v. *Denton,* 35 A.D.2d 176, 316 N.Y.S.2d 297, 302 (1970); *State* v. *Sherow,* 101 Ohio App. 169, 138 N.E.2d 444, 446 (1956); *Matter of Johnson,* 467 Pa. 552, 359 A.2d 739, 742 (1976); *State* v. *Bowers,* ____ S.C. ____, 241 S.E.2d 409, 412 (1978); *Burdick v. Marshall,* 8 S.D. 308, 66 N.W. 462, 464 (1896); *Strunk* v. *Lewis Coal Co.,* 547 S.W.2d 252, 253 (Tenn. Crim App. 1976); *Ex parte Cragg,* 133 Tex. Crim. Rep. 118, 109 S.W.2d 479, 481 (1937); *State ex rel. Dorrien* v. *Hazeltine,* 82 Wash. 81,

[5] *Accord: Jaikins* v. *Jaikins,* 12 Mich. App. 115, 162 N.W.2d 325, 329 (1968). *But see Detroit Bd. of Educ.* v. *Detroit Fed. of Teachers,* 55 Mich. App. 499, 192 N.W.2d 594, 598 (1974).

143 P. 436, 440 (1914); *State* v. *Tittner,* 102 W.Va. 677, 136 S.E. 202, 206 (1926); *State* v. *Meese,* 200 Wis. 454, 229 N.W. 31 (1930).

Moreover, in the remaining States, the standard is invariably set higher than Georgia's preponderance rule, *see, e.g., Crary v. Curtis,* 199 N.W.2d 319, 322 (Iowa 1972) ("clear, satisfactory and convincing" evidence); *Raszler* v. *Raszler,* 80 N.W.2d 535, 539 (N.D. 1957) ("clear and satisfactory" evidence); *Whillock* v. *Whillock,* 550 P.2d 558, 560 (Okla. 1976) ("clear and convincing" evidence); *State ex rel. Chrisman* v. *Small,* 49 Or. 595, 90 P. 1110, 1113 (1907) ("clear and conclusive" evidence); *Thomas* v. *Thomas,* ____ Utah ____, 569 P.2d 1119, 1121 (1977) ("clear and convincing" evidence). Indeed, the courts of these latter states frequently emphasize that a "mere preponderance" of the evidence is inadequate to support a conviction for criminal contempt. *See, e.g., Stein* v. *Municipal Court of Sioux City,* 46 N.W.2d 721, 724 (Iowa 1951): "a mere preponderance of the evidence in a contempt proceeding is not sufficient, as [the proof] must be of a clear, convincing and satisfactory nature." Georgia's rule, applied against petitioner, is thus completely aberrant.[6]

[6] Indeed, a recent commentator stated that "[i]t is well settled that each element of a criminal contempt, including the requisite mental state, must be proved beyond a reasonable doubt." Kuhns, *The Summary Contempt Power: A Critique and a New Perspective,* 88 YALE L.J. 39, 48 (1978) (footnote omitted).

II. THE COURT SHOULD GRANT CERTIORARI TO CONSIDER WHETHER PETITIONER'S CONVICTIONS AND SENTENCES FOR CRIMINAL CONTEMPT WERE IMPOSED IN VIOLATION OF THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES, AS CONSTRUED BY THIS COURT IN DECISIONS HOLDING THAT THE CONTEMPT POWER MAY NOT BE USED TO PUNISH PROTESTS OF RACIALLY DEROGATORY FORMS OF ADDRESS OR THE RAISING OF LEGAL ARGUMENTS.

The court below assumed that if petitioner said what the transcript indicated he said, then he was necessarily guilty of criminal contempt. Its analysis ignores, however, (in large part because of Georgia's lax evidentiary standard for the adjudication of contempt), the important findings of fact which must be made—but which may not have been properly made here—before petitioner can be punished for criminal contempt. First, under the law of Georgia, petitioner must have committed some act which entailed "interruption, disturbance, or hindrance to [the] proceedings" of a court, *Crudup* v. *State*, 218 Ga. 819, 130 S.E.2d 733 (1963), and this act must have been accompanied by an intent which contained "an element of criminality, involving ... the willful disobedience of orders or decrees made in the administration of justice," *Drakeford* v. *Adams*, 98 Ga. 722, 25 S.E. 833 (1896).

The federal Constitution imposes other substantive limits on the power of a State to declare conduct criminally punishable as contempt. This Court has squarely held that a black criminal defendant may not be held in contempt for refusing to answer a prosecutor or judge who addressed him by his first name. In *Hamilton* v. *Alabama*, the Court summarily reversed a contempt citation which had been imposed upon a witness for the following:

> "'Q What is your name, please?
>
> 'A Miss Mary Hamilton.
>
> 'Q Mary, I believe—you were arrested—who were you arrested by?
>
> 'A My name is Miss Hamilton. Please address me correctly.
>
> 'Q Who were you arrested by Mary?
>
> 'A I will not answer a question—
>
> 'BY ATTORNEY AMAKER: The witness's name is Miss Hamilton.
>
> 'A ——your question until I am addressed correctly.
>
> 'THE COURT: Answer the question.
>
> 'THE WITNESS: I will not answer them unless I am addressed correctly.

'THE COURT: You are in contempt of court—

'ATTORNEY CONLEY: Your Honor—your Honor—

'THE COURT: You are in contempt of this court, and you are sentenced to five days in jail and a fifty dollar fine."

Hamilton v. *Alabama,* 376 U.S. 650 (1964), *rev'g Ex parte Hamilton,* 156 So.2d 926 (Ala. 1963).[7] Such a form of address to black defendants is an official "assertion of their inferiority," *Strauder* v. *West Virginia,* 100 U.S. 303, 308 (1880). *See also Johnson* v. *Virginia,* 373 U.S. 61 (1963).[8]

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[7]*See* E. WARREN, THE MEMOIRS OF CHIEF JUSTICE EARL WARREN 295 (1977):

> "There are many other equally demeaning indignities imposed on blacks, some of which have been attributed to courts... Not only were they segregated and sworn to tell the truth as witnesses on different Bibles, but they were further demeaned by the manner in which they were addressed by both court and counsel. White witnesses would, of course, in keeping with good manners, be addressed as Mr., Mrs., or Miss in the giving of their testimony, but no black witnesses would be so addressed. With them, it was always Willie or George or Smith or even 'boy' with males and Mary or Gertie, etc., with females."

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[8]In *Johnson* v. *Virginia,* the Court summarily reversed the contempt citation of a black defendant who had refused to obey the trial judge's order to move to the "colored" portion of the courtroom and who remained standing in front of counsel table with his arms folded, stating that he would not comply with the judge's order.

The Court has also held, *Holt* v. *Virginia,* 381 U.S. 131 (1965); *In re McConnell,* 370 U.S. 230 (1962), that a lawyer may not be cited for contempt simply for presenting legal arguments and contentions. The test for criminal contempt is not the "vehemence of the language," *Craig* v. *Harney,* 331 U.S. 367, 376 (1947), used by the lawyer but whether there is actual obstruction.

> "The arguments of a lawyer in presenting his client's case strenuously and persistently cannot amount to a contempt of court so long as the lawyer does not in some way create an obstruction which blocks the judge in the performance of his judicial duty."

In re McConnell, supra, 370 U.S. at 236. For mere language to be contumacious, it "'must constitute an imminent, not merely a likely, threat to the administration of justice. The danger must not be remote or even probable; it must immediately imperil.'" *In re Little,* 404 U.S. 553, 555 (1972).

It is hardly self-evident that, under a proper evidentiary standard, petitioner's conduct constituted criminal contempt, particularly in a case where the line which the beyond-a-reasonable-doubt standard protects and defines is not only the boundary between guilt and innocence, but also the line between constitutionally protected and unprotected speech. *See*

Speiser v. *Randall, supra,* 357 U.S. at 526.[9] It is unclear, for example, that petitioner possessed the disruptive intent and "willfulness" demanded by Georgia law. For under *Hamilton* v. *Alabama,* petitioner's client Street could not have been held in contempt if *he* had refused to answer when the prosecutor called him by his first name. And petitioner could not have been held in contempt for advising Street to assert this right. *Maness* v. *Meyers,* 419 U.S. 449 (1975). Under the circumstances here, when defendant Street's life was literally in the balance, petitioner was arguably justified in believing that he should be able to assert vicariously Street's constitutional right to be free from being condescendingly addressed by his first name. *Cf. Fisher* v. *United States,* 425 U.S. 391, 402 n.8 (1976). Such a belief, if held in good faith, would surely negative criminal intent. Petitioner here made a judgment that Street should not have had to risk prejudicing the sentencing proceeding to assert his Fourteenth Amendment right,[10] since petitioner, by

[9]"The vice of the present procedure is that, where particular speech falls close to the line separating the lawful and the unlawful, the possibility of mistaken factfinding—inherent in all litigation—will create the danger that the legitimate utterance will be penalized."

[10]Indeed, for Street, "[t]here was no choice but Hobson's," *Canizio* v. *New York,* 327 U.S. 82, 92 (1946) (Rutledge J. dissenting), as to how to be free of racially derogatory and demeaning treatment in the courtroom. (1) If he refused to answer the prosecutor's questions, he risked having all his testimony stricken and being held in contempt by Judge Holton. While he could appeal his contempt sentence (and have it vacated under *Hamilton* v. *Alabama*), that would be cold comfort if he received a death sentence in the sentencing proceeding. (2) On the other hand, if he answered the prosecutor's questions which referred to him as "George", the fact that "'The objection is noted in the record . . . I will let you have it as a continuing objection throughout the trial,'" *Farmer* v. *Holton, supra,* 245 S.E.2d at 459, was equally ineffective to vindicate his rights. For if he received a sentence of life imprisonment (as he did), there would be no appeal at all. If he received a death sentence, it is not clear that this error would be sufficient to void the sentencing proceeding.

training and education, as well as his status in the proceedings, was far better equipped than his client to protect against racial discrimination.

Moreover, it is not clear, under a proper evidentiary standard, that petitioner's conduct constituted actual obstruction. While such a hindrance of the court's functioning might occur through prolix and vociferous argument. *see, e.g., In re Sacher,* 343 U.S. 1 (1952), the good faith albeit intemperate[11] presentation of an objection to racial discrimination, well founded in the decisions of this Court and plainly relevant to issues at the trial, is, at least arguably, not actual obstruction of the proceedings. For here, while petitioner was

[11]*But see* ABA STANDARDS RELATING TO THE PROSECUTIVE FUNCTION AND THE DEFENSE FUNCTION 145-146 (1970):

> "A lawyer cannot be timorous in his representation. Courage and zeal in the defense of his client's interest are qualities without which one cannot fully perform as an advocate. And, since the accused may well be the most despised of persons, this burden rests more heavily upon the defense lawyer."

vigorously argumentative and perhaps unduly strident[12] in his attempts to assert and protect the rights of his indigent client, his conduct did not significantly impede the progress of the hearings in which he was participating. The gist of the contumacious conduct here was not profanity, *see Eaton* v. *City of Tulsa,* 415 U.S. 697 (1974); *In re Little,* 404 U.S. 553 (1972), physical violence, *see Illinois* v. *Allen,* 397 U.S. 337 (1970), *ad hominem* abusive diatribes, *see Mayberry* v. *Pennsylvania,* 400 U.S. 455 (1971), or the assertion that petitioner had a "'"right to ask the questions, and [I] propose to do so unless some bailiff stops me,"'" *In re McConnell,* 370 U.S. 230, 235 (1962) (emphasis deleted). His conduct rather consisted of legal arguments and contentions on behalf of his client.

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[12]Canon 7, however, enjoins that "A lawyer should represent a client *zealously* within the bounds of the law." (Emphasis added.) The ABA Commentary to Canon 7 notes that "'An attorney has the duty to protect the interests of his client. He has a right to press legitimate argument and to protest an erroneous ruling.'... 'There must be protection ... [for] the attorney who stands on his rights and combats the order [of a trial judge] in good faith and without disrespect believing with good cause that it is void, for it is here that the independence of the bar becomes valuable.'" ABA CODE OF PROFESSIONAL RESPONSIBILITY AND CODE OF JUDICIAL CONDUCT EC 7-22, p. 34 n.38 (1977).

> "Against a 'hostile world' the accused, called to the bar of justice by his government, finds in his counsel a single voice on which he must be able to *rely with confidence* that his interests will be protected to the fullest extent consistent with the rules of procedure and the standards of professional conduct."

ABA STANDARDS RELATING TO THE PROSECUTIVE FUNCTION AND THE DEFENSE FUNCTION 146 (1970) (emphasis added).

While it is necessary for a judge to protect his courtroom from the obstruction of justice," it is also essential to a fair administration of justice that lawyers be able to make honest good-faith efforts to present their clients' cases." In re McConnell, supra, 370 U.S. at 236, Judges are required to tolerate some abrasiveness in the presentation of legal argument, for "the law of contempt is not made for the protection of judges who may be sensitive to the winds of public opinion. Judges are supposed to be men of fortitude, able to thrive in a hardy climate." *Craig* v. *Harney,* 331 U.S. 367, 376 (1947)

CONCLUSION

The two questions presented in this petition are closely interrelated: it is Georgia's aberrant preponderance-of-the-evidence rule[13] in criminal

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[13]The court below stated at one point in its opinion that "[t]he cases here present criminal contempt clearly and beyond a reasonable doubt." *Farmer* v. *Holton, supra,* 245 S.E.2d at 462. We respectfully suggest that this statement is nothing more than a rhetorical afterthought:

> (1) Most important, petitioner has a right to have *the finder of fact* determine his guilt beyond a reasonable doubt. Here, the trial judge in his two citations made no reference to an evidentiary standard, but presumably followed the settled law of Georgia. Even if the appellate court had applied a beyond-a-reasonable-doubt standard (which it did not), petitioner's due process rights would have been violated, since his conviction would have been affirmed on the basis of a different

contempt cases which facilitated petitioner's being sentenced to jail for constitutionally protected

evidentiary standard than was used in the trial court. *Cole* v. *Arkansas*, 333 U.S. 196 (1948); *Presnell* v. *Georgia*, 47 U.S.L.W. 3314 (U.S., Nov. 6, 1978).

(2) The court explicitly stated, both in its original opinion ("'a preponderance of evidence is sufficient to convict the defendant, as against the requirement of removal of any reasonable doubt which prevails in criminal cases.'" *Id.* at 462,) and in its opinion on rehearing ("We adhere to the authorities cited in the opinion" that "the standard of proof to be applied in contempt actions such as this is the civil standard of a preponderance of the evidence", *ibid.*), that petitioner's convictions were affirmed on the basis of a preponderance-of-the-evidence standard.

(3) The other Georgia cases cited by and relied upon by the court below (*Hill* v. *Bartlett, supra; Renfroe* v. *State, supra, Pedigo* v. *Celanese Corp. of America, supra*) unequivocally hold that the rule in Georgia is that proof of criminal contempt need only be by a preponderance of the evidence.

(4) About three weeks *after* it used the language quoted in the first sentence of this footnote, the court below wrote in its opinion on rehearing "Attorney Farmer takes issue with our holding that the standard of proof to be applied in contempt actions such as this is the civil standard of a preponderance of the evidence," 245 S.E.2d at 462.

(5) This is a case in which the Court has "the responsibility of making [its] own examination of the record," *Spano* v. *New York*, 360 U.S. 315, 316 (1959); *see also Norris* v. *Alabama*, 294 U.S. 587, 589-590 (1935), and the record here, *see* pp. 4-15, *supra*, simply will not support a finding beyond a reasonable doubt that petitioner was guilty of criminal contempt.

professional[14] conduct on behalf of an indigent, black client. Important questions are presented by the decision below concerning both the requirements of the Due Process Clause and the application of previous decisions of this Court. Petitioner respectfully prays that his petition for a writ of certiorari be granted.

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[14]The impact upon petitioner, an attorney, of these contempt judgments is much more drastic than simply four days' imprisonment. He may be subjected to professional obloquy and denied the right to practice *pro hac vice* in other jurisdictions. Indeed, petitioner has already been denied the right to represent a client in Florida on the basis of the two contempt judgments here.

Bundy & Farmer v. *Rudd et al.*, No. TCA 78-0897 (N.D. Fla. Sept. 15, 1978), *aff'd* No. 78-3026 (CA5 Oct. 2, 1978) (certiorari petition due to be filed by Dec. 29, 1978). *See also* ABA STANDARDS RELATING TO THE FUNCTION OF THE TRIAL JUDGE §3.5 (1972) (a trial judge may deny admission *pro hac vice* to an attorney from another jurisdiction who has been held in contempt.) In *Edmunds* v. *Chang*, 365 F. Supp. 941, 944 (D. Hawaii 1973) (footnote omitted), the court granted habeas relief to an attorney who had been held in contempt, remarking:

> "[t]he consequences of the pending action could be grave. An attorney's reputation is his principal professional asset; the success of his efforts often depends upon a delicate balance of harmony with the courts. A judgment of criminal contempt is something far more than a mere 'moral restraint' to one who occupies the status of an officer of the court. Moreover . . . there is at least the potential for disciplinary action being taken against an attorney who is found in contempt."

APPENDIX A

APPENDIX A

FARMER

v.

HOLTON (two cases).

Court of Appeals of Georgia.

Argued April 5, 1978.

Decided May 4, 1978.

Rehearing Denied May 26, 1978.

146 Ga. App. 101, 245 S.E.2d 457.

WEBB, Judge.

During the course of the retrial as to sentence of one George Street who had been convicted of murder and armed robbery,[1] attorney Millard Farmer, who at the retrial was counsel for the convicted murderer, was twice adjudged by the trial judge to be guilty of direct criminal contempt of the court. On one contempt charge the sentence was one day in the common jail and on the other the sentence was three days. We find no merit in any of the grounds argued in Farmer's two appeals, and affirm the judgments of conviction.

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[1] *Street v. State*, 238 Ga. 376, 233 S.E.2d 344 (1977).

First Contempt

The trial court adjudged Farmer in direct criminal contempt on September 14, 1977, and sentenced him to confinement for 24 hours in the common jail for contemptuous conduct occurring on that date. The court in its order recited that from the very beginning of the hearings in the sentencing aspect of the Street murder case, the contemnor had interrupted the court while the court ruled on objections and motions, had refused to obey the ruljng of the court, had disrupted the proceedings of the court, had refused to allow the court to continue in an orderly manner with the business before it, and had "continually demonstrated, by way of demeanor and words, his contempt for the orderly processes of this court." The order quoted as contemptible conduct by Farmer the following occurrence during the cross examination of the convicted felon, George Street, by the assistant district attorney, M.C. Pritchard: "Q. When did this take place, George? Mr. Farmer: Your Honor, may I object to—I don't mean to harass Mr. Pritchard too awful much, but we will refer to our client George Street by his first name, because that's an affectionate way that we feel about him. And we've known him a period of time. But, we would insist that when he is referred to by the prosecutors that he be referred to as Mr... Mr. Pritchard: In other words, ... The Court: I will not direct you to do that. Q. Do you have any objection to me calling you George? Mr. Farmer: Yes sir, Your Honor, I object to—his objection is from us. It is a demeaning thing for you to call black people by their first name and

to call white people Mr. We're not going to have a double standard. We're not going to be part of it. And, we're not going to have it. The Court: Objection overruled. You may ask the question. Mr. Farmer: Your Honor, it's a form of discrimination. The Court: The objection is overruled. The objection is noted in the record. Q. George, when did Mr. Strickland... Mr. Farmer: Your Honor, I object again to him calling my client George. We have stated repeatedly. He has used the term colored folks and he referred to yesterday them. He said, 'I'll call them whatever they want to be called' All of those things are racial slurs. This prosecutor is a racist. And, we've got to prevent it from coming through to the jury. We've got to prevent it from coming through to the Court at every state. [sic] We resent the fact that he is referring to the client as Mr. We have been through this situation in this State in which a trial judge allowed and told prosecutors and District Attorneys not to call black people Mr. in his Court. That's got to stop in this State if black people are to have equal justice. And, it can't stop if objection is not made to it at a proper time. If he is to address this individual he will address him as he addresses every other witness. He is not his friend. He is trying to have him electrocuted. And, he should address him as Mr. And, I object most strenuously to him using this term and it's being used in a derogatory and a discriminatory way, just as he was using colored and them and they and those kind of terms. They're all derogatory, racial slurs. The Court: Objection overruled. Q. George, when did... Mr. Farmer: Your Honor, I object to him referring to our client... Mr. Pritchard: ... Mr. Farmer: ... by any

name . . . The Court: Don't get up . . . Mr. Farmer: . . . at all. The Court: Have a seat. Mr. Sheriff? Sheriff: Yes, sir. The Court: Sit this gentleman down by the name of Mr. Farmer. Don't make that objection again. I will let you have it as a continuing objection throughout the trial. Mr. Farmer: May we be heard? The Court: No, sir, Mr. Farmer: May we put up evidence? The Court: No, sir. Mr. Farmer: Your Honor, may we argue this motion? The Court: No, sir. It's already been argued all the Court is going to hear it. Mr. Farmer: Your Honor, may I . . . The Court: No, sir Mr. Farmer: May I have time to prepare a motion? The Court: No, sir. Mr. Farmer: Your Honor, may I prepare a motion? The Court: No, sir. Mr. Farmer: May I make an offer of proof? The Court: No, sir. Mr. Farmer: May I confer with my client? The Court: Not at this point, no sir. Mr. Farmer: May I advise . . . The Court: Your client is on the stand just like . . . Mr. Farmer: . . . my client regarding his rights? The Court: . . . Don't interrupt the Court. Your client is on the stand. You put him on the stand just like any other witness. He will be treated just like any other witness. Mr. Farmer: Your Honor, I . . . The Court: No better or no worse. Mr. Farmer: I didn't put him on the stand to have him discriminated against. The Court: Overruled. Now don't make that objection again. You have a continuing objection. I mean about the calling him by the name of George. Mr. Farmer: Your Honor, do you object to me calling you Elie? The Court: Mr. Farmer, do not ask the Court any such question as that. That is a direct confront of the court of its authority. If you do that again I will consider it as a contempt of this Court. Mr. Farmer: What, Your Honor, may I ask the Court. I want to

inquire . . . The Court: You are to be quiet at this point and we're going to proceed with the cross examination. Mr. Farmer: When may I make an objection? The Court: Are you going to allow us to proceed with the cross examination of this witness? Mr. Farmer: Your Honor, I feel like in representing my client . . . The Court: Mr. Farmer, this Court finds your continual interruption of the Court, your refusal to allow us to continue with examination of this witness to be in contempt of Court. This Court so finds you in contempt of Court. It is the judgment of the Court that you are in contempt of Court. It's the judgment of the Court that you be sentenced to the common jail of this county for a period of 24 hours. Mr. Sheriff?"

Second Contempt

The second judgment for a direct criminal contempt by Farmer was eight days later, September 22, for his refusal to abide by the rulings of the court by persisting in a line of questioning which the court had repeatedly ruled impermissible, and in attributing improper motives to the court's rulings. Farmer made a direct verbal assault on the court, according to the citation for contempt, by charging it with malicious and arbitrary reasoning in its rulings. Attached as an exhibit to the court's order was a 23-page transcript, consisting in the most part of rambling and often obfuscatory attempts by attorney Farmer to establish that racial prejudice and discrimination had been exhibited by the judge and the prosecution during jury selection, which culminated in the following pertinent exchange:

"The Court: . . . Now, we'll deal with this juror situation when they come up. That will go to—probably go to qualifications of that juror. Mr. Farmer: Your Honor, the reason that we wanted to deal with it at this time is to point out to the Court, is that here are things that we are being able to show you and show the Court that's happening. We are not able to find out about everything that happens We are only able to, I'm sure, know a very, very small part of what is happening. And, the court has got to take corrective action and the Court has got to deal with this in a way that we've previously suggested in order that it will not happen. And, the Court has got to allow us to inquire into what the Court before lunch and previously wants to cover up. And, that is the racism that exists that's affecting these jurors and affecting Your Honor. . . Mr. Hayes: Your Honor, the State objects to the improper malicious argument he's making on the Court. The Court: All right, Mr. Farmer, the statement that the Court wants to cover it up is a direct contempt of this Court, knowingly made by you. I have repeatedly warned you about this. Again you have sought to make that statement. The court finds you in contempt of court, sir, again. The Court sentences you to 3 days in the county jail, ser . . . Mr. Farmer: Your Honor, may I be . . . The Court: . . . service to begin at the termination of this case. That's all. Mr. Farmer: Your Honor, may I be heard on this? The Court: No, sir. Mr. Farmer: Your Honor, may I have counsel to represent me and present evidence on this issue? The Court: No, sir. Mr. Farmer: Your Honor, may I for the purpose of here forward understand what can be my role in representing Mr. Street as far as bringing out the reason that I feel that he

is being denied a fair trial. I don't understand, Your Honor? The Court: You'll have to exercise your discretion and your knowledge as an attorney. Mr. Farmer: Your Honor, . . . The Court: That's all. Mr. Farmer: Your Honor, may I . . . The Court: No sir, we're through with that discussion. All right, call the next juror, Mr. Clerk."

1. The power to punish for contempt is inherent in every court of record, and under Code Ann. §24-104, every court has power to punish for contempt committed in its immediate presence. *Plunkett v. Hamilton,* 136 Ga. 72(1), 70 S.E. 781 (1911). "We start with the premise that the right of courts to conduct their business in an untrammeled way lies at the foundation of our system of government and that courts necessarily must possess the means of punishing for contempt when conduct tends directly to prevent the discharge of their functions." *Wood v. Georgia,* 370 U.S. 375, 383, 82 S.Ct. 1364, 1369, 8 L.Ed. 2d 569, 576 (1962).

"'It is fundamental that every court possesses the inherent power to preserve and enforce order and compel obedience to its judgments and orders, to control the conduct of its officers and all other persons connected with the judicial proceedings before it and to inflict summary punishment for contempt upon any person failing and refusing to obey any lawful order of such court. Code §§24-104, 24-105; *Bradley* v. *State,* 111 Ga. 168, 170, 36 S.E. 630, 50 L.R.A. 691, 78 Am.St.Rep. 157. This court will not undertake to control the wide discretion vested in the trial court in the

exercise of this fundamental power unless it is made to appear that wrong or oppression has resulted from an abuse of such discretion reposed in the court. *Carr* v. *State,* 76 Ga. 592, 596; *Perryman v. State,* 114 Ga. 545, 546, 40 S.E. 746.' *Jackson v. State,* 225 Ga. 553, 557(4), 170 S.E. 2d 281, 285 (1969) See *Garland v. State,* 101 Ga. App. 395, 427, 114 S.E.2d 176 (1960)." *Young* v. *Champion,* 142 Ga. App. 687, 691, 236 S.E.2d 783, 786 (1977).

2. Criminal contempt is that which involves some disrespectful or contumacious conduct toward the court. *Welborn v. Mize,* 107 Ga. App. 427, 130 S.E. 2d 623 (1963). It involves action by the court to compel respect thereto, to vindicate its authority, and to enforce the lawful processes and actions of the court. *Hill v. Bartlett,* 124 Ga. App. 56, 183 S.E. 2d 80 (1971). It is direct and punishable summarily without notice and opportunity to be heard if committed in the presence of the court, and is exempt from those due process requirements. *Mooody v. State,* 131 Ga. App. 355, 358(2), 359, 206 S.E.2d 79 (1974); *In re Fite,* 11 Ga. App. 665(2, 3), 76 S.E. 397 (1912); *United States v. Peterson,* 456 F.2d 1135, 1139 (10th CCA, 1972); Code Ann. §24-105[2]

[2]*Mayberry v. Pennsylvania,* 400 U.S. 455, 463, 91 S.Ct. 499, 504, 27 L.Ed.2d 532 (1971), does not require a hearing before a separate and independent judge for due process reasons, as argued by attorney Farmer. Mayberry states; "A judge cannot be driven out of a case. Where, however, he does not act the instant the contempt is committed, but waits until the end of the trial, on balance, it is generally wise where the marks of the unseemly conduct have left personal stings to ask a fellow judge to take his place."

""[T]he right to take such summary action is inherent in courts for their own preservation, is not subject to be abridged by legislative action or otherwise, and . . . for a direct contempt committed in the face of the court, one that threatens to scandalize or destroy order in the courtroom the offender 'may be instantly apprehended and immediately imprisoned, without trial or issue, and without other proof than [the judge's] actual knowledge of what occurred; and . . . , according to an unbroken chain of authorities, reaching back to the earliest times, such power, although arbitrary in its nature and liable to abuse, is absolutely essential to the protection of the courts in the discharge of their functions." *Moody* v. *State,* 131 Ga. App. 355, 359, 206 S.E.2d 79, 81 supra; *White* v. *George,* 195 Ga. 465, 469, 24 S.E.2d 797 (1943); *Garland* v. *State,* 99 Ga. app. 826, 831 110 S.E.2d 143 (1959).

2. "[T]he matter is not, strictly speaking, a criminal case, but is only quasi-criminal. It is tried under the rules of civil procedure, rather than under the rules of criminal procedure, and a preponderance of evidence is sufficient to convict the defendant, as against the requirement of removal of any reasonable doubt which prevails in criminal cases." *Hill v. Bartlett,* 124 Ga. App. 56, 183 S.E.2d 80, supra; *Renfroe v State,* 104 Ga. App. 362, 365, 121 S.E.2d 811 (1961); *Pedigo v. Celanese Corp. of America,* 205 Ga. 392, 54 S.E. 2d 252 (1949) cert. den. 338 U.S. 937, 70 S.Ct. 346, 94 L.Ed. 578. If there is any substantial evidence authorizing a finding that the party so charged was guilty of contempt, and that is the trial judge's

conclusion, his judgment must be affirmed insofar as the sufficiency of the evidence is concerned. *Nylen v. Tidwell,* 141 Ga.App. 256, 233 S.E. 2d 245 (1977). Questions of contempt if committed in the actual presence of the court are for the court treated with contempt, and the trial court's adjudication of contempt will not be interferred with unless there is a flagrant abuse of discretion. *Crudup v. State,* 106 Ga.App. 833, 838, 129 S.E. 2d 183 (1962); S.C., 218 Ga. 819, 130 S.E. 2d 733 (1963); cert. den., 375 U.S. 829, 84 S.Ct. 74, 11 L.Ed.2d 61.

4. "No attorney shall ever attempt to argue or explain a case, after having been fully heard, and the opinion of the court has been pronounced, on pain of being considered in contempt." Rule 23, Rules of the Superior Court (Code Ann. §24-3323). Here attorney Farmer, being an officer of the court and fully cognizant of the foregoing rule, needed no warning to cease persisting in his arguments in view of the rulings of the trial court. He needed no further protection, for his client than an adequate record, which presumably was made. Even if the trial judge were in error in some of his rulings, and we do not so hold, it was the duty of counsel to abide by those rulings; and if any right of his client was violated, the remedy was by appeal with which counsel is thoroughly familiar[3].

[3]We would note, however, that apparently, although counsel appeals from judgments giving him four days in jail, he must not have considered the trial judge to have made any harmful error in the retrial, inasmuch as he made no appeal for his client who received a life sentence, the lesser of two sentences applicable to a conviction of murder.

5. The cases here present criminal contempt clearly and beyond a reasonable doubt. Counsel's continuous disregard of the court's instructions, his question to the court, "do you object to me calling you Elie?," his verbal assault on the court charging it with malicious and arbitrary reasoning on rulings made during voir dire, and his assertion that the court would not allow him to inquire into "What the court . . . wants to cover up. And, that is the racism that exists that's affecting these jurors and affecting Your Honor. . ." were in insulting, contemptuous, and contumacious. As shown by the record, and by virtue of the rules of law stated and particularly Code Ann. §24-3323, we are unable to say that the trial judge's adjudications of contempt were gross, erroneous or flagrant abuses of discretion. Having conducted himself as the record shows, counsel perforce must abide the consequences.

Judgments affirmed.

QUILLIAN, P.J., and McMURRAY, J., concur.

ON MOTION FOR REHEARING

Attorney Farmer takes issue with our holding that the standard of proof to be applied in contempt actions such as this is the civil standard of a preponderance of the evidence, insisting for the first time that this standard is contrary to the due process requirements established in *Craig v. Harney,* 331 U.S. 367, 67 S.Ct. 1249, 91 L.Ed. 1546 (1947). That case is not controlling since it turns

upon First Amendment rights and the freedom of the press to make public comment on the actions of a judge, requiring a showing that the utterances created a "clear and present danger" to the administration of justice to merit punishment for contempt. We adhere to the authorities cited in the opinion.

Motion for rehearing denied.

APPENDIX B

APPENDIX B

CLERK'S OFFICE, SUPREME COURT OF GEORGIA

Atlanta 9/14/78

Dear Sir:

Case No. 33923 Farmer v. Holton, Judge

The Supreme Court today denied the writ of certiorari in this case. All the justices concur. Except Hall, J., who concurs specially

Very truly yours,
MRS. JOLINE B. WILLIAMS,
Clerk

Clerk's Office, Supreme Court of Georgia

Atlanta 10/3/78

DEAR SIR:

THE MOTION FOR RECONSIDERATION was denied today:

Case No. 33923 Farmer v. Holton, Judge.

Yours very truly,
MRS. JOLINE B. WILLIAMS,
Clerk